

STATE OF MICHIGAN  
COURT OF APPEALS

---

In the Matter of MAKYLA WILLIAMS, Minor.

---

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

MICHAEL WILLIAMS, SR. and LASHAWNDA  
MASJAY WRIGHT,

Respondents-Appellants.

---

UNPUBLISHED

September 29, 2009

No. 289260

Berrien Circuit Court

Family Division

LC No. 2008-000027-NA

Before: Owens, P.J., and Servitto and Gleicher, JJ.

GLEICHER, J. (*concurring*).

I concur with the result reached by the majority. I write separately to express my view that respondent father's right to appointed counsel attached at the outset of the proceedings, rather than when petitioner filed the supplemental permanent custody petition identifying him as a respondent. I believe that when the circuit court deprived respondent-father of the custody of his child, fundamental due process principles required that the circuit court offer respondent father appointed counsel in accordance with MCR 3.915(B)(1).

At the adjudication trial, petitioner recommended against respondent father having custody of Makyla and the referee unquestioningly accepted this recommendation. Despite respondent father's persistent requests for custody and his undisputed fitness, the referee inexplicably ordered Makyla's placement with petitioner. Petitioner's expressed opposition to respondent father's custody of his child and the referee's determination at the adjudication that "transferring this child back to the home of either parent would be inappropriate and would potentially cause more harm than any good that can come of it," functionally altered respondent father's status from that of a nonoffending parent to that of a respondent. When petitioner and the referee articulated that Makyla would be at risk in respondent father's custody, he qualified as a de facto respondent notwithstanding the absence of any formal allegations against him.

The importance of a parent's "essential" and "precious" right to raise his child is well-established in our jurisprudence. *Hunter v Hunter*, \_\_\_ Mich \_\_\_, \_\_\_ NW2d \_\_\_ (2009) (Docket No. 136310, decided July 31, 2009), slip op at 8-9. Because "[t]his right is not easily relinquished," "to satisfy constitutional due process standards, the state must provide the parents with fundamentally fair procedures." *Id.* at 9 (internal quotation omitted). As our Supreme

Court acknowledged in *Hunter*, “where the parental interest is most in jeopardy, due process concerns are most heightened.” *Id.* at 22.

Fundamental due process principles required that petitioner and the referee consider respondent father a respondent, and inform him at the adjudication trial of his right to appointed counsel. This is so because petitioner sought to deprive respondent father of his fundamental right to custody of Makyla for an unspecified period, and the referee agreed to this proposal. “There is no question that parents have a due process liberty interest in caring for their children.” *In re AMB*, 248 Mich App 144, 209; 640 NW2d 262 (2001). Child protective proceedings that divest a nonoffending parent of his child’s custody implicate that liberty interest, regardless whether the petitioner has *formally* identified the parent as a respondent.

In my view, the process due when a court deprives a nonoffending parent of his child’s custody should be determined by balancing the three factors described in *Mathews v Eldridge*, 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976):

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

These factors recognize that due process “is flexible and calls for such procedural protections as the particular situation demands.” *Id.* at 334, quoting *Morrissey v Brewer*, 408 US 471, 481; 92 S Ct 2593; 33 L Ed 2d 484 (1972).

Here, application of the *Eldridge* factors compels the conclusion that the referee should have offered respondent father appointed counsel at the adjudication trial and at every hearing conducted thereafter. First, the private interest of a parent in the care, custody and control of her children is one of the oldest fundamental liberty interests recognized by the United States Supreme Court. *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000). “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Prince v Massachusetts*, 321 US 158, 166; 64 S Ct 438; 88 L Ed 645 (1944). Because respondent father possessed a substantial and constitutionally protected interest in maintaining custody of Makyla, the first *Eldridge* factor weighs heavily in favor of his right to appointed counsel.

The second *Eldridge* factor considers the risks of error inherent in a proceeding. Here, the risk of erroneously depriving respondent father of his custodial right qualified as substantial. Without assistance from counsel, respondent father lacked the ability to fully comprehend that although he had not been formally named as a respondent, his fundamental right to custody hung in the balance during each and every hearing conducted in this case. Thus, a substantial risk existed that respondent father would suffer an erroneous deprivation of his custody of Makyla, despite that no evidence proved his unfitness. Appointed counsel would have identified the complete absence of allegations of respondent father’s unfitness, and would have reminded the

court that because Makyla spent her days in respondent father's home, the evidence strongly supported that she would remain safe in his custody.

Counsel additionally could have argued that if petitioner intended to use respondent father's sarcoidosis as a ground for terminating his rights, it first had to fully investigate the actual extent of his disability, and then offer services addressing any pertinent physical limitations.<sup>1</sup> Counsel would have emphasized that the foster care workers who testified in support of depriving respondent father of custody premised their opinions solely on a one-page form containing minimal diagnostic information, and that the workers had not actually spoken to the physician or determined that he possessed an understanding of the issues presented in a child welfare case. Counsel would have pursued additional medical information, pointed out that respondent father resided in a stable home with parents who assisted him when necessary, and would have vigorously challenged petitioner's claim that the sarcoidosis disqualified respondent father from raising his child. Lacking counsel's assistance, respondent father had no opportunity to advocate that under the ADA, his sarcoidosis served to *enhance* petitioner's obligation to initiate meaningful reunification efforts.

The third *Eldridge* factor involves the state's interests. Admittedly, appointment of counsel would impose on the state a financial burden. But this burden became inevitable once petitioner formally announced its intent to terminate respondent father's parental rights. Affording counsel during the months that petitioner deliberately sought to deprive respondent father of Makyla's custody likely would have spared the expense of repeating these proceedings, and would have contributed to a more reliable outcome. After balancing the *Eldridge* factors, I conclude that due process required that the circuit court afford respondent father the right to appointed counsel when it first ordered that Makyla reside outside his custody.

In *Lassiter v Dep't of Social Services of Durham Co, North Carolina*, 452 US 18, 31; 101 S Ct 2153; 68 L Ed 2d 640 (1981), the United States Supreme Court described the following hypothetical situation in which appointment of counsel would be required in a child protective proceeding:

If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel, and that due process did not therefore require the appointment of counsel.

In my view, this is such a case. Irrespective that the applicable state statute and court rule did not mandate the appointment of counsel for respondent father before petitioner formally

---

<sup>1</sup> Undoubtedly, counsel additionally would have highlighted that the burden of proof obligates *petitioner* to establish respondent father's unfitness, physical or otherwise, by clear and convincing evidence. MCR 3.977(A)(3); MCL 712A.19b(3). The case worker testimony in this case suggests that petitioner improperly shifted to respondent father the burden of substantiating his physical fitness.

identified him as a respondent, I believe that basic notions of procedural due process triggered that right when the court denied his requests for custody of his child.

/s/ Elizabeth L. Gleicher